No. 75-1585

In the Supreme Court of the United States

OCTOBER TERM, 1975

FOREST D. McGUIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not yet reported. The opinion of the district court (Pet. App. 5a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1976. A petition for rehearing was denied on March 30, 1976 (Pet. App. 4a). The petition for a writ of certiorari was filed on April 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether incriminating evidence discovered by police officers at police headquarters under a chair on which petitioner previously had been sitting should have been suppressed as the fruit of an illegal arrest.

2. Whether the prosecution was barred by collateral estoppel from eliciting from a government witness an explanation that his testimony at an earlier trial not involving petitioner had been erroneous.

STATEMENT

After a jury-waived trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of knowing possession of money stolen from a federally insured bank, in violation of 18 U.S.C. 2113(c). He was sentenced to six years' imprisonment. The court of appeals affirmed (Pet. App. 1a-3a).

The facts, as found by the district court (Pet. App. 5a-9a), were that in the early morning of October 14, 1971, burglars used an acetylene torch and burning bar to break into the safe of a federally insured bank in Fallston, North Carolina, from which they removed more than $14,357 in currency, some of which had been partially burned during the burglary; they also removed two packages of twenty-dollar bills whose serial numbers previously had been recorded on lists retained by the bank manager (Pet. App. 5a).

Soon thereafter, the resident manager of an apartment house in East Nashville, Tennessee received as rent payments from tenants in two apartments currency that was partially burned. The resident manager thereupon notified government agents, who determined that information supplied to the apartment manager by one of the tenants regarding the tenant's place of employment was false (Pet. App. 6a). The agents then went to the apartments to question the tenants. A woman departed from the first apartment just as the agents arrived; the remaining occupant identified himself as Lawrence Brooks and stated that the woman was his wife, and that she was going to the store.

When the agents reached the second apartment, they learned that a man had just left the first apartment through an open window. At the second apartment, the agents found petitioner, another man who identified himself as Arrites Oden, and the woman whom the agents had seen leaving the first apartment. The woman told the agents that the male occupant of the first apartment was Raymond Perry; she denied that she was his wife. The man who identified himself as Oden said that he was the tenant of the second apartment, and he gave as his place of employment a company that the agents knew did not employ anyone residing at the apartment building.

When the agents asked petitioner why he was in the apartment, petitioner stated that he had come there to visit a friend. The friend to whom petitioner referred was not present, however, and petitioner stated that he did not know the whereabouts of his friend. The officers arrested petitioner, Oden and the woman.

After petitioner arrived at police headquarters, one of the police officers on duty observed petitioner reach under the chair on which he was seated. After petitioner departed, the officer discovered under the chair three $100 bills and ten $20 bills, some of which had been partially burned. Two of the $20 bills subsequently were identified as having been stolen from the Fallston, North Carolina bank.

ARGUMENT

1. Petitioner contends that the currency discovered by the police officer under a chair on which petitioner had sat at police headquarters following his arrest should have been suppressed as the fruit of an unlawful arrest. Petitioner, however, never claimed a possessory interest in the currency. At the hearing on petitioner's pretrial motion to suppress, petitioner testified that he had no

knowledge of the currency discovered in the police station, and that he had never seen or received it (Tr. 21-22).[1] Accordingly, petitioner has no standing to complain of the seizure of the currency. *Brown* v. *United States*, 411 U.S. 223, 227; *Simmons* v. *United States*, 390 U.S. 377; *Jones* v. *United States*, 362 U.S. 257, 261. Moreover, even if petitioner once had a possessory interest in the currency, petitioner had abandoned the currency and therefore relinquished possession by the time the police officer discovered it. *Abel* v. *United States*, 362 U.S. 217, 241.

In any event, the district court correctly denied petitioner's motion to suppress, since the arrest was based on probable cause (Pet. App. 3a). Petitioner was found in an apartment upon which a rental payment recently had been made with currency that had been burned, soon after a bank burglary committed with the use of an acetylene torch and burning bars. Petitioner was in the company of a woman whom the agents previously had seen at another apartment upon which a rental payment also had been made with burned currency. The woman provided information that contradicted information that had been provided by the occupant of the former apartment. Petitioner also was in the company of another individual who provided information which the agents knew to be false. Finally, when asked to explain his presence in the apartment, petitioner stated that he was there to visit a friend whose whereabouts was unknown.

2. At the trial of two individuals charged with committing the bank burglary, a police detective testified that police officers had searched the two above-mentioned apartments pursuant to warrants and had discovered

[1]"Tr." refers to the one-volume transcript of the trial and pretrial hearing on petitioner's motion to suppress, which has been lodged with the Clerk of this Court.

incriminating evidence in each location, including two $20 bills that had been stolen from the bank.

Subsequently, at petitioner's trial, the government attempted to show that the same two $20 bills actually had been discovered under the chair upon which petitioner had been sitting at police headquarters. Defense counsel moved to compel the government to bind itself to the account given at the former trial. The court, however, permitted the police detective who had testified at the former trial to explain that testimony; he stated that on taking the stand he had been presented with a basket of evidentiary materials, including envelopes containing currency found in one of the apartments, but that he had not been aware that the basket also included one envelope which contained bills that had been discovered at police headquarters (Tr. 78-85).

Petitioner contends that the prosecution was barred by collateral estoppel from changing its identification of the currency. The principle of collateral estoppel is applicable, however, only where an ultimate fact has once been determined by a final judgment in a case litigated by the same parties to the subsequent litigation. *Ashe* v. *Swenson*, 397 U.S. 436, 440. Petitioner, however, was not previously tried; he was not a party to the prior proceedings; and there is no showing that the identification of the currency constituted an issue of ultimate fact necessary for conviction in the prior case. Moreover, the government had a responsibility to disclose that it had erroneously identified the currency in the former trial, and to correct the error. Cf. *Napue* v. *Illinois*, 360 U.S. 264. Any prior inconsistency in the witness's testimony merely went to the witness's credibility. *United States* v. *Hill*, 463 F.2d 235 (C.A. 5), certiorari denied, 409 U.S. 952.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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